

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERRY DORAN, et al.,

Plaintiffs,

v.

EMBASSY SUITES HOTEL, et al.,

Defendants.

No. C-02-1961 EDL

ORDER GRANTING IN PART AND DENYING
IN PART DEFENDANT'S MOTION TO
STRIKE

On April 22, 2002, Plaintiffs filed this action against Defendants alleging violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. section 12101, et seq., the California Civil Code sections 54, 54.1 and 54.3, the California Health and Safety Code section 19955, et seq., the California Civil Code section 51 and the California Business and Professions Code section 17200, et seq. Generally, Plaintiffs contend that Defendants' property contains numerous architectural barriers at Defendants' public place of business which discriminatorily deny equal access to disabled individuals. On June 20, 2002, Defendants filed this Motion to Strike Portions of Plaintiff's Complaint. On July 15, 2002, Plaintiffs opposed the motion and on August 6, 2002, Defendants replied.

Defendants seek to strike several portions of the complaint relating to damages. See Fed. R. Civ. Proc. 12(f) ("the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."). Specifically, Defendants move to strike Plaintiffs' requests for: (1) compensatory damages under the ADA; (2) punitive damages under California Civil Code section 3294; and (3) daily damages under California Civil Code sections 52(a) and 54.3(a). Defendants also seek

1 to strike Plaintiffs' claim for violation of Health and Safety Code section 19955 or, alternatively, all requests
2 for monetary damages within this claim.

3 Plaintiffs do not oppose Defendants' motion with respect to compensatory damages under the ADA.
4 Further, Plaintiffs do not dispute that monetary damages are not available under Health and Safety Code section
5 19955.

6 **DISCUSSION**

7 **1. Punitive damages**

8 The Unruh Civil Rights Act, at California Civil Code sections 51 and 54, bans various types of
9 discrimination, including discrimination against the disabled in places of public accommodation. See Arnold
10 v. United Artists Theatre Circuit, Inc., 866 F. Supp. 433, 437 (N.D. Cal. 1994). Civil Code section 52(a)
11 allows recovery of actual damages and "any amount that may be determined by a jury, or a court sitting without
12 a jury, up to a maximum of three times the amount of actual damage but in no cases less than four thousand
13 dollars (\$4,000), and any attorney's fees that may be determined by the court in addition thereto," for violation
14 of Civil Code section 51. In addition, Section 54.3(a) allows recovery of actual damages and any amount
15 determined by a jury or a judge sitting without a jury "up to a maximum of three times the amount of actual
16 damages, but in no case less than one thousand dollars (\$1,000)," for violation of Civil Code section 54.

17 Plaintiffs seek both treble damages under Civil Code sections 52(a) and 54.3(a) and punitive damages
18 pursuant to California Civil Code section 3294. Civil Code section 3294 states:

19 [i]n an action for the breach of an obligation not arising from a contract, where it is proven
20 by clear and convincing evidence that the defendant has been guilty of oppression, fraud,
21 or malice, the plaintiff, in addition to the actual damages, may recover damages for the
22 sake of example and by way of punishing the defendant.

23 At least one district court in this Circuit held that punitive damages are not recoverable in addition to
24 treble damages under Civil Code sections 52(a) and 54.3(a). See Botosan v. Fitzhugh, 13 F.Supp.2d 1047,
25 1051 (S.D. Cal. 1998). There, on facts similar to those here, the disabled plaintiff asserted claims under the
26 ADA as well as under state law against the owner of property on which an inaccessible restaurant was located.
27 The Botosan court concluded that because the language of the treble damages provisions found in Civil Code
28 sections 52(a) and 54.3(a) was punitive in nature, the plaintiff could not also recover punitive damages under
Civil Code section 3294. Botosan, 13 F. Supp. 2d at 1052 (quoting Harris v. Capital Growth Investors XIV,
52 Cal.3d 1142, 1172 (1991)). The Botosan court followed the reasoning in Harris, where the California

1 Supreme Court specifically stated that “[m]oreover, the damages provision [of the Unruh Act] allowing for an
2 exemplary award of up to treble the actual damages suffered with a stated minimum amount reveals a desire
3 to punish intentional and morally offensive conduct.” Harris, 52 Cal.3d at 1172.

4 Botosan’s conclusion is supported by the legislative history of Civil Code section 54.3(a), by the
5 language of Civil Code section 52(a) and by cases interpreting analogous statutory damages provisions. In
6 amending Civil Code section 54.3 in 1977, the California Legislature expressly determined that some limitation
7 on the exemplary damage limit that was previously a part of Civil Code section 54.3 was “desirable.” 1977
8 Cal. Stat. Chap. 881 at p. 2651. The Legislature viewed the amendment increasing the punitive damage
9 limitation from \$500 to \$1,000 was seen as a limit “more consistent with the scope of the potential wrong.”
10 Id. Most importantly, the Legislature specifically stated that “it is the intention of this act to establish reasonable
11 limits of recovery” with regard to private rights of action. Id.

12 Further, Civil Code section 52(b), which creates a remedy for sexual harassment and discriminatory
13 violence, expressly provides for exemplary damages, while section 52(a), which is at issue here, provides
14 instead for treble damages. This distinction between two subsections of the same statute indicates that the
15 Legislature knew how to provide unlimited damages as a remedy when it wished to do so and consciously
16 chose not to under Civil Code section 52(a).

17 Courts interpreting analogous statutory damages provisions have found that where a statute provides
18 a remedy that is punitive in nature, a plaintiff may not recover punitive damages in addition to the punitive
19 statutory damages. See DeAnza Santa Cruz Mobile Estates Homeowners Ass’n v. DeAnza Santa Cruz
20 Mobile Estates, 94 Cal.App.4th 890, 915 (2001) (“We have found no persuasive authority for the proposition
21 that plaintiff is allowed to recover punitive damages [under Civil Code section 3294] based solely on a statutory
22 violation where the statute expressly provides for a penalty that is punitive in nature.”). In DeAnza, the court
23 addressed the availability of actual damages and punitive damages in the context of the Mobilehome Residency
24 Law (“MRL”). In addition to actual damages, the MRL provided for a discretionary monetary award for each
25 willful violation. Cal. Civ. Code § 798.86 (West 1982 & Supp. 2002). After examining the legislative history
26 and general rules of statutory construction, the DeAnza court determined that the statutory penalty of \$500
27 contained in former Civil Code section 786.86 was the exclusive penalty in a suit to enforce the MRL.
28 Specifically, the court concluded that where a statute creates new rights and obligations not existing at common
law, the express statutory remedy is the exclusive remedy available, unless it is inadequate. DeAnza, 94

1 Cal.App.4th at 912 (citing Turnbull & Turnbull v. ARA Transp., Inc., 219 Cal.App.3d 811, 826-27 (1990)
2 (when a statute provides a claim for violation of a recognized right, “all forms of relief granted to civil litigants
3 generally, including appropriate punitive damages, are available unless a contrary legislative intent appears,”
4 but “when a new right, not existing at common law, is created by statute and a statutory remedy for the
5 infringement thereof is provided, such remedy is exclusive of all others unless the statutory remedy is
6 inadequate.”). The DeAnza court noted that if a plaintiff could prove a common law tort based on the same
7 conduct as the statutory violation, she could recover punitive damages under Civil Code section 3294, provided
8 that she met the requirements of that section. “However, a plaintiff cannot recover both punitive damages and
9 statutory penalties as this would constitute a prohibited double penalty for the same act.” DeAnza, 94
10 Cal.App.4th at 912. The DeAnza court stated that a plaintiff who relies solely on a statutory violation is
11 deemed to have waived entitlement to punitive damages. Id. at 913; see also Troensgaard v. Silvercrest Indus.,
12 Inc., 175 Cal.App.3d 218 (1985) (interpreting a provision of the Song-Beverly Consumer Warranty Act, Civil
13 Code section 1794, which provides for a civil penalty of up to two times the amount of actual damages in
14 addition to actual damages, and holding that punitive damages were therefore not available); Turnbull, 219
15 Cal.App.3d 811 (interpreting the Unfair Business Practices Act, Business & Professions Code section 17082,
16 which provides for recovery of treble damages, and finding that the plaintiff was not entitled to both treble
17 damages and punitive damages based on the statutory violation.).

18 Chabner v. United of Omaha Life Insurance Company, 225 F.3d 1042 (9th Cir. 2000) is not to the
19 contrary. The plaintiff in Chabner pled statutory claims for violations of the ADA, the California Insurance
20 Code, the Business and Professions Code and the Unruh Civil Rights Act and a common law tort claim for
21 fraud. In a footnote, the Chabner court recognized that the plaintiff’s state law claims authorized treble
22 damages, attorney’s fees and punitive damages. Chabner, 225 F.3d at 1047, n. 3. The Chabner court,
23 however, did not confront the issue presently before this Court, and did not specify in the footnote which state
24 law claim it viewed as providing a basis for the plaintiff to recover punitive damages. The possibility of punitive
25 damages may well have been based on the claim for fraud, rather than the claim for violation of the Unruh Act.

26 In Commodore Home System, Inc. v. Superior Court, 32 Cal.3d 211 (1982), the Court examined
27 whether an award of punitive damages was appropriate under the Fair Employment and Housing Act
28 (“FEHA”). The Commodore Court noted that the section of FEHA permitting private court action does not
discuss remedies at all except for fees and costs: “The FEHA, on the other hand, provides separate routes to

1 resolution of claims; first, a complaint to the Department; second, if that agency fails to act, a private court
2 action. The statute discusses remedies only in the first context; here we are concerned with those available in
3 the second.” Commodore, 32 Cal.3d at 216. Based on the statute’s silence as to remedies for judicial
4 proceedings and the absence of clear legislative intent, the Commodore court ruled that all relief, including
5 punitive damages under Civil Code section 3294, was available. Id. at 221.

6 The express statutory provision for treble damages at issue here is punitive in nature like the monetary
7 award for willful violations at issue in DeAnza, and is unlike the statutory silence on damages at issue in
8 Commodore Home. The Unruh Act, like the MRL and other statutes such as the Song-Beverly Act and the
9 Unfair Business Practices Act, expressly provide for judicial remedies that are punitive in nature, rendering the
10 catchall punitive damages remedy of Civil Code section 3294 unavailable. By contrast, the FEHA does not
11 expressly provide for any judicial remedies for private suits, except an award of costs and fees. Therefore,
12 Plaintiffs here cannot recover punitive damages.

13 The Court shares Plaintiffs’ concern about the importance of compliance with the Unruh Act’s policy
14 against disability discrimination. Plaintiff argues that allowing punitive damages under Civil Code section 3294
15 in addition to the express remedies provided in the Act will further this policy. The Court has no doubt,
16 however, that the Legislature took the importance of disability rights into account when it crafted the stringent
17 remedies of minimum statutory damages, even in the absence of actual damages, and treble actual damages and
18 attorney’s fees, which can be a sizeable amount. At the same time that the Legislature specifically provided
19 for these several types of damages in Civil Code sections 52(a) and 54.3(a), it chose not to provide for
20 unlimited punitive damages. The Legislature evidently concluded that the extensive remedies that it enacted
21 were adequate for enforcement of this important law.

22 **2. Daily Damages**

23 Plaintiffs seek daily damages, pursuant to Civil Code sections 52 and 54.3, for each day from July 11,
24 2001, the date on which Plaintiff stayed at the hotel, until such date that Defendants’ property is brought into
25 compliance with the ADA. Civil Code sections 52(a) and 54.3(a) do not specifically provide for an award of
26 daily damages. Instead, each statute provides that a party is liable for each offense under that section. See Cal.
27 Civ. Code § 52(a) (West 1982 & Supp. 2002) (“ . . . liable for each and every offense. . . .”); Cal. Civ. Code
28 § 54.3(a) (West 1982 & Supp. 2002) (“ . . . liable for each offense. . . .”).

1 On its face, the language regarding “each offense” makes no reference to daily damages and appears
2 to contemplate an award based on the number of instances of non-compliance, not on the passage of time.
3 By contrast, for example, Civil Code section 789.3 states that a landlord in violation of that section shall be
4 liable for “an amount not to exceed one hundred dollars (\$100) for each day or part thereof the landlord
5 remains in violation of this section.” Cal. Civ. Code § 789.3 (West 1982) (prohibiting a landlord from, among
6 other things, wilfully depriving tenants of utility services for the purpose of evicting the tenant).

7 Although the parties found one published and one unpublished federal case on this question of state law,
8 they did not cite and the Court did not locate any California authority addressing whether Civil Code sections
9 52(a) or 54.3(a) support an award of daily damages. California courts have, however, addressed similar
10 language in analogous statutory schemes. Notably, the Unfair Business Practices Act’s similar provision for
11 damages “for each violation” of unfair competition has been interpreted as supporting calculation of damages
12 on the basis of specific instances of violations, rather than authorizing daily damages. Cal. Bus. & Prof. Code
13 § 17206 (West 1997 & Supp. 2002); see also Hewlett v. Squaw Valley Ski Corp., 54 Cal.App.4th 499, 536
14 (1997) (awarding penalties based on this statute for specific instances of improper timber harvesting and
15 attendant conduct, but not on a daily basis). Another instructive case is City & County of San Francisco v.
16 Sainez, 77 Cal.App.4th 1302 (2000), in which the trial court awarded statutory penalties against owners of
17 rental housing for various housing code and building code violations. Under the Housing Code section
18 applicable at that time, the court was specifically required to assess statutory penalties of \$1,000 per day. The
19 court also found that the landlord’s conduct constituted fifty-three violations of the Unfair Business Practices
20 Act, for which the trial court could assess a \$2,500 maximum penalty for each violation according to Business
21 and Professions Code section 17206. The trial court assessed the mandatory daily penalty under the Housing
22 Code, but awarded a smaller penalty based on the number of Unfair Business Practices Act violations, not the
23 number of days that the violations persisted.

24 Moreover, the California Supreme Court, in an extensive review of civil penalties under California law,
25 found that, unlike the daily damages required under Civil Code section 789.3, penalties for many other forms
26 of civil misconduct under state law are generally “limited either to a fixed multiple of actual damages, to a
27 specified total amount per ‘violation’ or to a fixed duration.” Hale v. Morgan, 22 Cal.3d 388, 383 (1978)
28 (holding that the mandatory award of daily damages as provided under Civil Code section 789.3, which is
potentially limitless and imposes a penalty more severe than that imposed for other more serious civil violations,

1 may, under certain circumstances, produce constitutionally excessive penalties). The Hale Court noted several
2 state statutes providing for a maximum of treble damages. Id. (detailing Civil Code sections 1747.60, 1747.70
3 and 1812.9, relating to denial of rights to fair credit; Civil Code section 1794, relating to consumer protection;
4 Public Utilities Code section 7951, relating to injury to property; and Civil Code section 3346, relating to
5 wrongful injury to timber). California law also includes examples of civil penalties assessed on a “per violation”
6 basis. Id. (listing Civil Code section 52(b), relating to denial of civil rights; former Health and Safety Code
7 section 35738, relating to housing discrimination; and Health and Safety Code section 35823, relating to
8 discriminatory lending). The Hale Court also noted Labor Code section 203, which provides for daily
9 damages, but limits the penalty to thirty days. Id.

10 Here, Civil Code sections 52(a) and 54.3(a) provide for statutory damages for each offense. While
11 Sainez, Hewlett and Hale do not involve the Civil Code sections at issue in the instant case, those cases indicate
12 that the phrase, “for each offense,” like the phrase, “for each violation,” provides for statutory damages based
13 on each specific instance of non-compliance, rather than on the mere passage of time. If the Legislature
14 intended to provide for daily damages in Civil Code sections 52(a) and 54.3(a), it could have specifically
15 provided for them. Even where the Legislature provides for daily damages, as in Civil Code section 789.3,
16 California courts have “looked with disfavor on ever-mounting penalties and have narrowly construed the
17 statutes which either require or permit them.” Hale, 22 Cal.3d at 383-84.

18 Without analyzing the caselaw under analogous statutes, the Botoson court reached a different
19 conclusion, based solely on its reading of Arnold v. United Artist Theatre Circuit, Inc., 866 F. Supp. 433
20 (NDCa 1994). Botosan, 13 F. Supp. at 1051-52. This Court respectfully disagrees with Botosan’s
21 interpretation of Arnold. The question of daily damages was not before the court in Arnold. Rather, Arnold
22 addressed the separate question of whether any damages at all are available under the Unruh Act to a person
23 with a disability who was deterred from attending a theater that she knew did not afford access. The Court
24 held that a deterred plaintiff could state a claim for damages “where she proved that violations of applicable
25 California disability access standards deterred her *on a particular occasion* from attempting to attend a place
26 of public accommodation. . . .” Arnold, 866 F. Supp. at 439 (emphasis added). Thus, Arnold simply held
27 that a plaintiff could get damages for specific instances of deterrence on specific occasions, not that a plaintiff
28 could get daily damages until compliance was achieved.

Based on the plain language of Civil Code sections 52(a) and 54.3(a) as well as on analysis of analogous statutory schemes, daily damages are not available for Plaintiffs' claims. Accordingly, Defendants' motion to strike references to daily damages is granted.

3. California Health and Safety Code section 19955

California Health and Safety Code section 19955 insures that public accommodations or facilities constructed in this state with private funds are "made available for the physically handicapped." Cal. Health & Safety Code § 19955 (West 1992). As Plaintiffs concede, the statute supports a claim for injunctive relief, but not for damages. Donald v. Café Royal, Inc., 218 Cal.App.3d 168, 183, 266 Cal. Rptr. 804, 813 (Cal. Dist. Ct. App. 1990); see also Mantic Ashanti's Cause v. Godfather's Pizza, 1999 US Dist. Lexis 16675, *15 (S.D. Cal.).

Because Health and Safety Code section 19955 provides a private right of action for injunctive relief, Defendants' motion to strike the entire claim is denied. Instead, Defendants' motion to strike is granted with respect to references to monetary damages for violation of Health and Safety Code section 19955, but denied with respect to references to injunctive relief.

CONCLUSION

Defendants' Motion to Strike (docket number 8) is granted in part and denied in part as follows:

1. Paragraph 58, relating to compensatory damages under the ADA, is stricken.
2. The same willful conduct that would support punitive damages would also support treble damages under Civil Code sections 52(a) and 54.3 (a). Accordingly, Defendants' motion to strike references to willful conduct and punitive damages is granted in part. The following portions of the complaint relating to punitive damages are stricken:
 - a. Paragraph 38 at 11:27-12:2, placing a period after the phrase " similarly situated persons" at 11:26.
 - b. Paragraph 41 at 13:19-20, placing a period after the phrase "similarly situated persons" at 13:19.
 - c. Paragraph 42 at 13:21, striking the introductory phrase "Punitive Damages," so the paragraph begins, "Defendants, and each of them."
 - d. Paragraph 42 at 14:8-9, placing a period after the phrase "similarly situated persons" at 14:8.

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e. Paragraph 44 in its entirety.

3. Paragraph 35 at 11:2-9 (beginning with “Plaintiffs seek damages . . . ,” and ending with “. . . physical disabilities”); Paragraph 63 at 20:12-18 (beginning with “A separate act in violation. . . ,” and ending with “. . . plaintiff Jerry Doran’s first visit.”); Item 3 of Prayer for Relief for the Second Cause of Action and Item 2 of the Prayer for Relief for the Fourth Cause of Action, relating to daily damages under Civil Code sections 52 and 54.3 are stricken.

4. Paragraph 78 and Items 2 and 3 of the Prayer for Relief for the Third Cause of Action relating to claims for monetary damages under Health and Safety Code section 19955 are stricken.

Plaintiff shall file an amended complaint in compliance with this Order no later than September 16, 2002.

IT IS SO ORDERED.

Date: August ____, 2002

ELIZABETH D. LAPORTE
United States Magistrate Judge

copies mailed to
counsel of record